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**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF PEARL I. MACKERCHAR
DOCKET NO. 2013-13
CLAIM OF PEARL I. MACKERCHAR

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Hearing Examiner's proposed Opinion and Recommendation. No exceptions to the proposed Opinion and Recommendation were filed.

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation, attached hereto, with the following modifications:

1. On page 1, in the first paragraph of the History, the period Claimant was not working for the School District of Philadelphia should be September 11, 2001 through July 20, 2006, not October 11, 2001 through July 20, 2006.
2. On page 1, in the first paragraph of the History, the date Claimant timely filed her Appeal and Request for Administrative Hearing should be May 3, 2013, not May 8, 2013.

3. On page 3, Findings of Fact No. 6, the reference should be to the Public School Employees' Retirement Code, not the Pennsylvania State Employees' Retirement Code.
4. On page 8, Findings of Fact No. 38, the date Claimant timely filed her Appeal and Request for Administrative Hearing should be May 3, 2013, not May 8, 2013.

With the above modifications, we hereby adopt the Hearing Examiner's Opinion and Recommendation as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to receive service credit for the period Claimant was not working for the School District of Philadelphia and was receiving Workers' Compensation benefits (i.e., from September 11, 2001, through July 20, 2006) is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: Jan. 21, 2015

By: Melva S. Vogler
Melva S. Vogler, Chairman

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

In Re: Account of Pearl I. MacKerchar :

Docket No. 2013-13

Claim of Pearl I. MacKerchar :

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PSERB
EXECUTIVE OFFICE

OPINION AND RECOMMENDATION

Date of Hearing: July 23, 2014
Hearing Officer: Marc A. Moyer, Esquire
For the Claimant: Pearl I. MacKerchar, *pro se*
For PSERS: Kathrin V. Smith, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board on appeal filed by Pearl I. MacKerchar ("Appellant") from an April 3, 2013 determination by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Appellant's request for service credit for the period Appellant was not working for the School District of Philadelphia and was receiving Workers' Compensation benefits, from October 11, 2001 through July 20, 2006. By letter dated April 25, 2013, the ESRC notified Appellant of its decision to deny Appellant an additional service credit on the ground that her Workers' Compensation leave did not qualify as an "approved leave of absence" under the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et. seq.* Appellant timely appealed from the ESRC's determination on May 8, 2013, and requested an administrative hearing.

PSERS filed an Answer with New Matter on May 22, 2013. A formal administrative hearing was, thereafter, scheduled for July 23, 2014. By Order dated June 30, 2014, the Hearing Officer denied Appellant's June 19, 2014 Request for Change of Venue. By Order dated July 15, 2014, the Hearing Offer granted Appellant's and PSERS's request to permit Appellant and PSERS witness, Deborah Puskas, to participate at the hearing by telephone from PSERS's Southeast Regional Office in Warminster, Pennsylvania. A formal hearing was held, as scheduled, on July 23, 2014, before Hearing Officer Marc A. Moyer, Esquire.

Appellant participated in the hearing, *pro se*, and testified on her own behalf. Appellant admitted ten (10) exhibits into evidence, without objection by PSERS, consisting of notes written by Appellant containing contact information for the staff at the School District of Philadelphia (hereinafter "Philadelphia School District") (Exhibit A-1); correspondence between Appellant and the Philadelphia School District (Exhibits A-2, A-3); Department of Labor and Industry

Notice of Hearing, Supersedeas Decision, and Interlocutory Order (Exhibits A-4, A-5, A-5-5+); May 28, 2014 correspondence from W. William Shay, D.O. supporting Appellant's application to participate at the hearing by telephone (Exhibit B-1); Appellant's November 20, 2012 correspondence to the ESRC (Exhibit B-2); December 4, 2012 correspondence to Appellant from PSERS acknowledging its receipt of Appellant's appeal (Exhibit B-3); and June 20, 2014 correspondence from PSERS's Assistant Deputy Chief Counsel objecting to Appellant's request for change of venue. (Exhibit B-4).

PSERS presented its case through the admission of twenty-four exhibits consisting of documents from Appellant's PSERS records related to her claim for an additional service credit. (Exhibits PSERS-1 through PSERS-24). PSERS additionally presented the testimony of Regional Office Administrator, Deborah Puskas, and PSERS Director for the Bureau of Communications and Counseling, Eugene Robinson.

By Order dated August 5, 2014, the Hearing Officer directed Appellant to file her Post-Hearing Brief no later than September 4, 2014. The Order further directed PSERS to file its Post-Hearing Brief no later than October 3, 2014, and directed Appellant to file her Reply Brief, if any, no later than October 20, 2014. Appellant filed a Post-Hearing Memorandum on September 2, 2014, to which she attached September 22, 2005 correspondence from Michael G. Dryden and February 17, 2006 correspondence from Benetta A. Corely which had not been admitted into evidence at the hearing. PSERS filed its Post-Hearing Brief on October 3, 2014, in addition to a Statement of Objections to the correspondence enclosed with Appellant's Post-Hearing Brief.¹ Appellant filed a Reply Brief on October 23, 2014. The record in this matter closed with the

¹ By Order dated October 22, 2014, the Hearing Officer sustained PSERS's objections to the documents being considered part of the record.

Parties filing of their Post-Hearing Briefs, and the filing of Notes of Testimony (“N.T.”) on August 1, 2014.

FINDINGS OF FACT

1. Appellant enrolled with PSERS in 1990 pursuant to employment with the School District of Philadelphia (hereinafter “Philadelphia School District”) (N.T. 95).
2. Appellant was injured while working for the Philadelphia School District on September 8, 2000, and did not work for the District subsequent to that date. (Exhibits A-3, A-4, A-5, A-5-5, B-2, N.T. 26-28).
3. Appellant received workers’ compensation benefits from on or about September 8, 2000 through an unspecified date in 2006. (Exhibits A-3, A-4, A-5, A-5-5, B-2, N.T. 27-28).
4. The Philadelphia School District reported Appellant to be an active member of PSERS from September 8, 2000 through September 10, 2001. Contributions were made to PSERS on Appellant’s behalf for those dates of service. (Exhibits PSERS-5, PSERS-6; N.T. 105, 111-112, 116-118, 128-129).
5. The Philadelphia School District did not report Appellant to PSERS after September 10, 2001, and no contributions were made on Appellant’s behalf after that date. (Exhibits PSERS-7, PSERS-8, PSERS-9, PSERS-20; N.T. 105, 111-112, 116-118, 121-122).
6. The Philadelphia School District reported to PSERS that Appellant’s date of termination was September 10, 2001, which represented Appellant’s last date of active employment with the District as defined by the Pennsylvania State Employees’ Retirement Code. (hereinafter “Retirement Code”). (N.T. 104-106, 113, 128-129).

7. Appellant received *Statements of Account* from PSERS dated December 6, 2002, March 26, 2003, March 24, 2004, April 13, 2005, and November 30, 2005. (Exhibits PSERS-5, PSERS-6, PSERS-7, PSERS-8, PSERS-9; N.T. 95-97).
8. The *Statements of Account* from PSERS dated December 6, 2002, March 26, 2003, March 24, 2004, April 13, 2005, and November 30, 2005, informed Appellant that she had accrued, in aggregate, between 10.81 and 11.41 years of service. (Exhibits PSERS-5, PSERS-6, PSERS-7, PSERS-8, PSERS-9; N.T. 95-97).
9. The *Statements of Account* from PSERS dated March 26, 2003, April 13, 2005, and November 30, 2005, informed Appellant that she had accrued no years of service during the 2002-2003, 2003-2004, 2004-2005 school years. (Exhibits PSERS-7, PSERS-8, PSERS-9; N.T. 97-98, 123-124).
10. PSERS provided Appellant a *Normal Retirement Estimate* dated June 22, 2006, which estimated her years of service at 11.69 years, and stated "YOUR RETIREMENT WILL BE EFFECTIVE THE DATE YOUR APPLICATION FOR RETIREMENT IS RECEIVED BY PSERS." (Exhibit PSERS-10; N.T. 36-38, 72-74,77).
11. Pursuant to Appellant's request, PSERS provided Appellant a *Disability Retirement Estimate* dated July 6, 2006, which estimated her years of service at 11.69 years, and stated "YOUR RETIREMNT WILL BE EFFECTIVE THE DATE YOUR APPLICATION FOR RETIREMENT IS RECEIVED BY PSERS." (Exhibit PSERS-11; N.T. 42-43, 73-74).
12. Appellant attended a PSERS's Retirement Exit Counseling session with a PSERS counselor on August 16, 2006. (Exhibit PSERS-12; 45, 75).

13. The PSERS's counselor reviewed important aspects of a PSERS retirement estimate with Appellant at the August 16, 2006 Exit Counseling session, including a review of the method for determining final average salary, service credit, and a beneficiary's retirement date. (Exhibit PSERS-12; N.T. 76-81, 85, 92-93).
14. PSERS routinely prints a copy of a claimant's retirement statement to be reviewed during an Exit Counseling session in the event a claimant fails to bring her retirement statement with her to the Exit Counseling session. (N.T. 77, 81).
15. Appellant either had, or was provided her *Normal Retirement Estimate* at the August 16, 2006 Exit Counseling session. (N.T. 77, 81).
16. The PSERS counselor discussed Premium Assistance with Appellant and provided Appellant with a *PSERS Health Options Program* handout which set forth the eligibility requirements for the Program in the event Appellant satisfied any of the following requirements: (1) Having twenty-four and one-half (24 1/2) years of credited service; (2) Having a termination date and retirement date on or after age sixty-two (62) with at least fifteen (15) years of service; or (3) The collection of disability benefits through PSERS. (Exhibit PSERS-13; N.T. 46-47, 80, 82-84).
17. The PSERS counselor would have responded to any questions asked of her by Appellant at the Exit Counseling session regarding the effect of Appellant's Workers' Compensation benefits, if any, on Appellant's calculation of benefits, including discussing with Appellant the termination date of her employment as it related to Appellant's effective date of retirement. (N.T. 92-93).
18. PSERS received and processed Appellant's *Application for Retirement* on August 24, 2006. (Exhibit PSERS-14; N.T. 47, 86, 101).

19. PSERS provided Appellant with an Initial Retirement Benefit letter on September 21, 2006. The letter identified Appellant's termination date as June 30, 2003, and her retirement date as August 24, 2006. (Exhibit PSERS-15; N.T. 49-50, 99-101).
20. An Intent to Change form was included with the September 21, 2006 Initial Retirement Benefit letter. The Intent to Change form provided Appellant the opportunity, until October 25, 2006, to change the retirement option she had selected, including voiding the retirement application or changing the effective date of retirement. (Exhibit PSERS-15; N.T. 101-102).
21. Appellant did not make any changes to her retirement selections by October 25, 2006. (Exhibit PSERS -19; N.T. 109-110).
22. In addition to the September 21, 2006 Initial Retirement Benefit letter, PSERS provided Appellant additional retirement information on September 21, 2006, including a pamphlet "Being Retired" and the *PSERS Health Options Program* handout which describe the eligibility requirements for Premium Assistance. (Exhibit PSERS-16; N.T. 51, 102-103).
23. On January 23, 2008, PSERS sent Appellant a *Recomputation of Your Retirement* letter which informed Appellant of her final retirement benefit, based upon 11.71 years of service. The letter also identified Appellant's termination date a September 10, 2001, and her retirement date as August 24, 2006. (Exhibit PSERS-17; N.T. 53, 103-104).
24. The January 23, 2008 Recomputaion letter was sent to Appellant following PSERS's audit of Appellant's account, and after PSERS confirmed Appellant's dates of employment with the Philadelphia School District as Appellant's former employer. (N.T. 103-104).

25. During PSERS's audit, the Philadelphia School District reported to PSERS that Appellant's termination date was September 10, 2001. (N.T. 104-106, 108, 112-113).
26. Appellant's termination date of September 10, 2001, set forth in the January 23, 2008 Recomputation letter, was different from the June 30, 2003 termination date previously set forth in PSERS's September 21, 2006 Initial Retirement Benefit letter based upon information provided to PSERS from the Philadelphia School District regarding Appellant's actual termination date under the Retirement Code which defines Appellant's termination date as the last date of Appellant's active employment with the Philadelphia School District. (N.T. 104-106).
27. The change in Appellant's termination date from June 30, 2003 to September 10, 2001 had no effect on Appellant's service credit, or her monthly retirement benefits under the Retirement Code. (Exhibit PSERS-18; N.T. 107-108, 112-113).
28. On September 24, 2012, Appellant requested for the first time that PSERS review her account to determine whether she should have been accruing service credit while she was out of work and receiving Workers' Compensation benefits. (Exhibit PSERS-19; N.T. 109-110).
29. By letter dated October 31, 2012, PSERS informed Appellant that it had conducted the review she had requested, and that it concluded she was not entitled to additional service credit. PSERS further determined that Appellant's service credit should be 11.67 years, rather than the 11.71 years for which Appellant had been credited. (Exhibit PSERS-20; N.T. 62-63, 111).
30. Appellant appealed to the PSERS Executive Staff Review Committee after receiving PSERS's October 31, 2012 determination letter. (Exhibit PSERS-23; N.T. 119).

31. At no time did the Philadelphia School District approve Appellant for Special Sick Leave. (N.T. 116).
32. Appellant did not qualify for, and was not placed on Special Sick Leave at any time so as to qualify her for service credit while receiving Workers' Compensation benefits. (Exhibit PSERS-21, Exhibit PSERS-22; N.T. 112, 114-115).
33. At no time did the School District of Philadelphia withhold retirement contributions from Appellant while Appellant received Workers' Compensation benefits, and the District provided no such contributions to PSERS on Appellant's behalf. (N.T. 118).
34. At no time were Appellant's years of service or termination date "backdated". Nor was the calculation of Appellant's years of service based upon such occurrences. (N.T. 112).
35. No reporting unit reported that Appellant was an active contributing member between September 10, 2001, and the date of Appellant's retirement, August 24, 2006. (N.T. 121-122).
36. By letter dated April 25, 2013, the ESRC denied Appellant's request to be credited with service for the period beginning September 10, 2001 on the ground that Workers' Compensation leave did not qualify as an "approved leave of absence" under the Public School Employees' Retirement Code, 24 Pa.C.S. § 8101 *et. seq.* (Exhibit PSERS-24; N.T. 119-120).
37. PSERS provided Appellant a service credit of 11.67 years. (Exhibit PSERS-20; N.T. 113).
38. Appellant appealed from the ESRC's determination on May 8, 2013. (Official Notice-Agency Records- *Appeal and Request for Administrative Hearing*).

39. An administrative hearing was held on July 23, 2014, before Hearing Officer, Marc A. Moyer, Esquire. Appellant appeared via telephone from PSERS's Warminster, Pennsylvania office pursuant to the Hearing Officer's July 15, 2014 Order.
40. Appellant was served with all pleadings, orders, and notices filed of record in this matter. (Official Notice-Agency Records).

CONCLUSIONS OF LAW

1. Appellant has been afforded an opportunity to be heard in connection with her appeal. (Finding of Fact, Nos. 39-40).
2. Appellant has the burden of establishing the facts necessary to support her claim. *Gierschick v State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
3. Appellant's right to the service credit she seeks is limited exclusively to the benefits permitted by the Pennsylvania Public School Employees' Retirement Code, 24 Pa.C.S.A. § 8101 *et. seq.* *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001).
4. Appellant did not render school services, was not on an approved leave of absence, was not on Special Sick Leave, and was not working or contributing to PSERS after September 10, 2001, during the period she was not working for the School District of Philadelphia and was receiving Workers' Compensation benefits. (Findings of Fact, Nos. 1-6, 16, 25, 27, 20-21, 32-36; 24 Pa.C.S.A. § 8102; 24 Pa.C.S.A. § 8302(a); 24 Pa.C.S.A. § 8302(b); 22 Pa.Code § 213.2; PSERS Business Rule, SSL-2010-01.2; PSERS Business Rule, LOA-2013-07).

5. Appellant is not entitled to service credit for the period she was not working and receiving Workers' Compensation benefits, from September 11, 2001 through July 20, 2006. (Findings of Fact, Nos. 1-6, 16, 25, 27, 20-21,32-36; 24 Pa.C.S.A. § 8102; 24 Pa.C.S.A. § 8302(a); 24 Pa.C.S.A. § 8302(b); 22 Pa.Code § 213.2; PSERS Business Rule, SSL-2010-01.2; PSERS Business Rule, LOA-2013-07; *Trakes v. Public School Employes' Retirement System*, 768 A.2d 357 (Pa. Cmwlth. 2000)).
6. Appellant has 11.67 years of service credit with PSERS. *Id.*

DISCUSSION

This matter involves an appeal from an April 3, 2013 decision by the PSERS Executive Staff Review Committee to deny Appellant's request for service credit from the date of Appellant's last date of active employment with the School District of Philadelphia, September 10, 2001, through July 20, 2006. During that period, Appellant was not providing school service and was receiving Workers' Compensation benefits as a result of an injury. Appellant's basis for her appeal stems, in part, from what she characterizes as inconsistencies regarding her "date of termination" from the Philadelphia School District set forth within notification letters she received from PSERS following her retirement. Appellant contends that her date of termination should be later than that calculated by PSERS, and that adjusting her termination date will increase her service credit which, in turn, will increase her monthly retirement benefits and enable her to qualify for Premium Assistance. Appellant also contends that she was misled by various parties regarding the implications of retiring in 2006 after having received Workers' Compensation benefits.

As the party appealing from the determination of the PSERS Executive Review Committee decision, Appellant bears the burden of establishing that she is entitled to the service

credit she seeks under Pennsylvania's Public School Employees' Retirement Code, 24 Pa.C.S.A. § 8101 *et. seq.* *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).

The degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. A litigant must satisfy its burden of proof with evidence that is substantial and legally credible, not with mere "suspicion" or by only a "scintilla" of evidence.

Lansberry v. Pennsylvania Public Utility Commission, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990).

A litigant's burden of proof before administrative tribunals is satisfied by establishing a preponderance of evidence which is substantial and legally credible. *Id.* at 601-602.

Statutory Framework

It is well established that a retiree's right to benefits under the Retirement Code is strictly limited to those specifically set forth by the Code. See, *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778, 780 (Pa. Cmwlth. 2001). The Retirement Code at 24 Pa.C.S.A. § 8302(a) provides, in pertinent part, as follows:

§ 8302. Credited school service

- (a) Computation of credited service.-** In computing credited school service of a member for the determination of benefits, a full-time salaried school employee shall receive one year of credit for each school year or the corresponding fraction thereof, in accordance with the proportion of the full school year for which the required regular member contributions have been made, or for which such contributions otherwise required for such service were not made solely by reason of any provision of this part relating to the limitations under IRC § 401(a)(17) or 415(b)...

24 Pa.C.S.A. § 8302(a). The Retirement Code at 24 Pa.C.S.A. § 8302(b) provides, in pertinent part, as follows:

(b) Approved leaves of absence.- An active member shall receive credit for an approved leave of absence provided that:

- (1) the member returns for a period at least equal to the length of the leave or one year, whichever is less, to the school district which granted his leave, unless such condition is waived by the employer; and
- (2) the proper contributions are made by the member and the employer.

24 Pa.C.S.A. § 8302(b). Thus, the Retirement Code permits an “active member” of PSERS to receive retirement credit for: (1) “school service”, which is defined as “service rendered by a school employee”; or (2) for an “approved leave of absence.” See, 24 Pa.C.S.A. §§ 8102, 8302(a)(b).

The Retirement Code defines an “active member” as a “school employee for whom pickup contributions are being made to the fund or for whom such contributions otherwise required for current school service are not being made solely by reason of any provision of this part relating to the limitations under section 401(a)(17) or 415(b) of the Internal Revenue Code. *Id.* A “school employee” is defined by the Retirement Code as any “person engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee...”. 24 Pa.C.S.A. § 8102.

“Approved leave of absence” is defined by the Retirement Code as “leave of absence for activated military service or which has been approved by the employer for sabbatical leave, service as an exchange teacher, service with a collective bargaining organization or professional study.”. *Id.*

Alternatively, service credit may be obtained for “Special Sick Leave” pursuant to PSERS Business Rule, SSL-2010-01.2. However, such credit can only be obtained in the event all of the following criteria set forth in the Business Rule are satisfied: (1) The leave must be

approved by the employer; (2) The member must receive at least half pay during the leave through salary, worker's compensation or other disability insurance paid by the employer; (3) The member and employer must pay contributions based upon the full contracted salary; and (4) The leave is limited to one year in duration. See, PSERS Business Rule, SSL-2010-01.2 (Exhibit PSERS-22). Significantly, a member who is absent from work while receiving Workers' Compensation benefits is not eligible to earn or purchase service credit for such time unless the member is/was on an approved Special Sick Leave described above. See, PSERS Business Rule, LOA-2013-07 (Exhibit PSERS-21). Moreover, service credit is expressly prohibited during the period of any leave granted for reasons other than for "school services", an "approved leave of absence", or a "special sick leave". 22 Pa.Code § 213.2.

In this case, Appellant has failed to establish that she is entitled to a service credit by having satisfied any of the foregoing statutory and regulatory requirements. Instead, the record contains uncontroverted evidence to the contrary. Specifically, Appellant readily concedes that she was injured while working for the Philadelphia School District on September 8, 2000, and that she did not work for the District subsequent to that date.² Although the Philadelphia School District reported Appellant to be an active member of PSERS from September 8, 2000 through September 10, 2001, and made contributions PSERS on Appellant's behalf for those dates of service, the Philadelphia School District did not report Appellant to PSERS after September 10, 2001, and no contributions were made on Appellant's behalf after that date. Instead, the Philadelphia School District reported to PSERS that Appellant's date of termination was

² Appellant asserts that she attempted to return to work for the Philadelphia School District prior to her retirement, but that the position offered to her was not appropriate based upon her professional qualifications and physical limitations. (Exhibits A-2, A-3; N.T. 29-30). However, Appellant has produced no evidence that she had returned to work or that contributions were made to PSERS by any employer after September 10, 2001. Accordingly, circumstances surrounding Appellant's purported attempt to return to work are immaterial to Appellant's eligibility for additional service credit under the Retirement Code.

September 10, 2001, which represented Appellant's last date of active employment with the District as defined by the Public School Employees' Retirement Code.

In that regard, the record is devoid of any evidence that Appellant was a "school employee" or was on an "approved leave of absence" for activated military service, sabbatical leave, on service as an exchange teacher, or on service with a collective bargaining organization or professional study. The record similarly fails to establish that Appellant satisfied all of the specifically enumerated requirements for being granted Special Sick Leave after September 10, 2001, so as to be eligible for service credit while receiving Workers' Compensation benefits.³

The PSERS Executive Staff Review Committee's denial of service credit for the period Appellant was receiving Workers' Compensation benefits is in accordance with Pennsylvania Commonwealth Court decisions addressing issues nearly factually identical to the present matter. In *Trakes v. Public School Employees' Retirement System*, 768 A.2d 357 (Pa. Cmwlth. 2000), for example, the Commonwealth Court was presented with the question of whether the Retirement Code provides active member status in PSERS to public school employees who, like Appellant, are off work while receiving Workers' Compensation benefits. *Id.* at 359. In *Trakes*, several PSERS members sought service credits and other relief for periods during which they were off work and receiving Workers' Compensation benefits due to injuries. Based upon common questions presented through each of the members' claims, the Pennsylvania Public School Employees' Retirement Board consolidated the members' administrative appeals following the Board's denial of the members' applications. After conducting consolidated hearings, the hearing examiner issued a recommended opinion and order upholding PSERS's denial upon finding, in

³ PSERS correctly notes in its Post-Hearing Brief that the District continued to report Appellant to PSERS as an active member and that it made contributions to PSERS during that year based upon Appellant ostensibly satisfying the requirements for "Special Sick Leave" during that period. For that reason, Appellant's current service credit already encompasses a credit for that period.

part, that the claimants did not satisfy the definition of active members, and thus did not qualify for disability benefits under the Retirement Code. *Trakes*, 768 A.2d at 361.

Citing to its earlier decision in *Rowan v. Pennsylvania State Employees' Retirement Board*, 685 A.2d 238 (Pa. Cmwlth. 1996) when affirming the Board's decision to uphold the hearing examiner's determination, the Commonwealth Court found that "under the statutory scheme set forth by the General Assembly, workers compensation recipients cannot earn service credit because public school employees that are not receiving compensation for actual work performance cannot be classified as active members." *Id.* at 363. The Court further found that active member status does not exist under the Retirement Code even in instances where the employer makes pickup contributions, as Appellant in this case apparently believed was occurring. Instead, the Court found that "active member status requires more than simply the payment of pickup contributions, it requires actual work for which compensation is paid." *Id.* In the same context, the Court went on to find that a leave of absence for a work-related injury does not fit within the definition of "leave of absence" under the Retirement Code. *Trakes*, 768 A.2d at 365.

In *Rowan v. State Employees' Retirement Board*, 685 A.2d 238 (Pa. Cmwlth. 1996), the Commonwealth Court similarly addressed the status of Workers' Compensation recipients within the context of the State Employees Retirement System ("SERS") which employs statutory programs similar to those administered by PSERS. In that case, a Turnpike Commission employee sustained a work-related injury for which he received Workers' Compensation benefits during intermittent periods he could not work due to the injury. *Id.* at 239. Neither the claimant, nor his employer, made contributions to his SERS account during the periods claimant did not work. Like Appellant in this case, the claimant sought to obtain service credit for the periods

during which he was off work and was receiving Workers' Compensation benefits, after leaving the Turnpike Commission. *Rowan*, 685 A.2d at 239.

In sustaining the State Employees' Retirement Board's denial of the claimant's request to purchase service credit for the periods he was receiving Workers' Compensation benefits, the Commonwealth Court found that the claimant was not entitled to receive a service credit because he was no longer an "active member" of SERS or contributing to the fund. *Id.* at 240. Instead, the Commonwealth Court found that although the Pennsylvania legislature has recognized specific circumstances where a state employee may be absent from work and still receive credit for state service, no such exception exists for individuals receiving Workers' Compensation benefits. *Id.* Because Appellant's right to a service credit in this case, if any, is derived exclusively by the provisions of Retirement Code, and may not be based upon considerations beyond the Retirement Code, Appellant has failed to demonstrate her right to additional service credit beyond those specifically provided to her by the statute and PSERS's Regulations for which she has already been provided.

Estoppel

Faced with the statutory mandates set forth above, Appellant has made what amounts to a claim that PSERS is somehow precluded from denying her additional service credit based upon erroneous advice she was given by the Philadelphia School District, her union representatives, and her Workers' Compensation attorney regarding the implications of retiring when she had. (Exhibit B-2; N.T. 18-19, 21). It is well established that the statutory provisions of the Retirement Code strictly apply, even when the Appellant may not have been provided adequate or correct information from PSERS, her employer, or from a third party. *Tyson v. Pennsylvania Public School Employes' Retirement System*, 737 A.2d 325, 328 (Pa. Cmwlth. 1999); *Finnegan*

v. Public School Employes' Retirement Board, 560 A.2d 848, 852 (Pa. Cmwlth. 1989);

Cosgrove v. State Employes' Retirement Board, 665 A.2d 870 (Pa. Cmwlth. 1995).

In *Finnegan*, PSERS erroneously informed a member that she could purchase fifteen years of out-of-state service credit which would have provided the member with 30 years of active service. *Finnegan*, 560 A.2d at 849. The member relied on that information and made an irrevocable decision to retire. The Retirement Code, however, restricted such purchases to twelve years. *Id.* As a result, the member received far smaller retirement benefits than she expected. On appeal, the Commonwealth Court affirmed PSERS's determination that the member was not permitted to purchase additional service credit because doing so would be tantamount to impermissibly permitting PSERS's employees to amend the statute. *Finnegan*, 560 A.2d at 851. Citing to *Finnegan*, the Commonwealth Court reached the same conclusion in *Cosgrove*, where it found that the statutory language of the Retirement Code prevents retirees from changing their retirement benefit elections, even under circumstances where members may have been misled by inadequate counseling by the State Employees' Retirement System. *Cosgrove v. State Employes' Retirement Board*, 665 A.2d 870, 874 (Pa. Cmwlth. 1995).

In this case, upholding the decision of the PSERS Executive Staff Review Committee is even more compelling than in *Finnegan* and *Cosgrove* because Appellant has offered no evidence that she was provided erroneous or misleading information by PSERS regarding her retirement benefits and/or service credit. At most, Appellant testified to having no memory of having discussed the effect of her Workers' Compensation status on her service credit during her Exit Counseling session. In the absence of such a recollection, Appellants Retirement Counselor established at the hearing that she would have answered any questions Appellant may have had on that topic, had such questions been asked. Irrespective of what may, or may not have been

discussed however, Pennsylvania law makes clear that the substance of any such discussions cannot negate or otherwise usurp the provisions of the Retirement Code upon which PSERS relied when it appropriately denied Appellant's request for additional service credit.

Termination Date/Notice of Actual Service Credit

Appellant makes a separate, but related, argument that her service credit was improperly reduced based upon a retroactive adjustment to her termination date and, therefore, that she was misled into retiring when she did as a result of PSERS failing to correctly inform her of her actual service credit. However, the record fails to support Appellant's contentions in a number of respects. The Retirement Code at 24 Pa.C.S.A. § 8102 defines a member's "effective date of retirement" as follows:

"Effective date of retirement." The first day following the date of termination of service of a member if he has properly filed an application for an annuity within 90 days of such date or:

- (1) In the case of a member who applies for an annuity subsequent to 90 days after termination of service, the date of filing such application or the date specified on the application, whichever is later.
- (2) In the case of a vestee who files an application for an annuity within 90 days of his superannuation age, the attainment of such age.
- (3) In the case of a vestee who defers the filing of an application for an annuity to a date later than 90 days following attainment of superannuation age, the date of filing or the date specified on the application, whichever is later.
- (4) In the case of a finding of disability, the date certified by the board as the effective date of disability.

24 Pa.C.S.A. § 8102.

Appellant filed her Application for Retirement, and PSERS processed her Application on August 24, 2006, thereby making her retirement effective on that date. Upon receipt of Appellant's Application, PSERS promptly provided Appellant with an initial retirement benefit

letter on September 21, 2006 which set forth her estimated retirement benefits in an effort to avoid delays in paying Appellant by placing her on the payroll schedule as soon as practical. Pursuant to the provisions of the Retirement Code at 24 Pa.C.S.A. § 8102, PSERS identified Appellant's retirement date as August 24, 2006 because her Application for Retirement was received by PSERS more than 90 days from the date of her termination. As a result of PSERS not having yet audited Appellant's account or having received confirmation from the Philadelphia School District regarding Appellant's actual dates of employment, and because the Retirement Code required Appellant's termination date to be 24 months from the last date of Appellant's reported service, PSERS's September 21, 2006 correspondence preliminarily identified Appellant's termination date as June 30, 2003. 24 Pa.C.S.A. § 8102. *See also*, N.T. 105.

To the extent Appellant contends that PSERS's later adjustment of her termination date adversely affected the amount of service credit she received, her contentions are belied by the facts of record, and by the provisions of the Retirement Code. In particular, the Retirement Code at 24 Pa.C.S.A. § 8102 defines a member's termination date as follows:

“Date of termination of service.” The last date of service for which pickup contributions are made for an active member or, in the case of an inactive member, the effective date of his resignation or the date his employment is formally discontinued by his employer or two years following the last day of service from which contributions were made, whichever is earliest.

Following PSERS's issuance of its September 21, 2006 correspondence, PSERS received information from the Philadelphia School District as part of its audit. That information confirmed Appellant's termination date as September 10, 2001. By letter dated January 23, 2008, PSERS informed Appellant of her finalized retirement benefits based upon 11.71 years of service. The letter also appropriately reflected Appellant's termination date of September 10,

2001, based upon information provided to PSERS from the Philadelphia School District pursuant to the PSERS audit. Thus, PSERS adjustment of Appellant's date of termination correctly reflects Appellant's dates of actual service.⁴

Appellant also asserts that she should be granted additional service credit because she was under the mistaken belief that PSERS contributions were being deducted from her Workers' Compensation benefits, and because she was not made aware that she was not accruing service credit while on Worker's Compensation. Once again however, Appellant's contentions are unsupported by the record. Appellant has offered no evidence that such deductions were, in fact, made from her Workers' Compensation benefits or that they were provided to PSERS. As set forth previously herein, Appellant's mistaken belief that such payments were being made cannot serve as a basis for PSERS disregarding the clear provisions of the Retirement Code which define Appellant's eligibility for benefits based upon her existing service credit.

The record equally dispels any notion that Appellant was not made aware of the service credit she had accrued, or that she was not made aware that her service credit was not increasing over time. Appellant had begun receiving Statements of Account documenting approximately 11 years of service credit as early as December 6, 2002. Appellant continued to receive additional Statements of Account on four more occasions between December 6, 2002 and November 30, 2005, which once again annotated approximately 11 years of service credit. Three of the Statements informed Appellant that she was not receiving service credit after the 2001-2002 school year.

The record also shows that PSERS provided Appellant a *Normal Retirement Estimate* dated June 22, 2006, which estimated her years of service at 11.69 years, and stated "YOUR

⁴ The adjustment of Appellant's date of termination did not result in a decrease of her service credit but, instead, only determined the date upon which Appellant was to begin to receive her annuity. *See, e.g.*, 24 Pa.C.S.A. §§ 8102, 8307, 8342(a)

RETIREMENT WILL BE EFFECTIVE THE DATE YOUR APPLICATION FOR RETIREMENT IS RECEIVED BY PSERS.” Pursuant to Appellant’s request, PSERS provided Appellant a *Disability Retirement Estimate* dated July 6, 2006, which estimated her years of service at 11.69 years, and stated “YOUR RETIREMENT WILL BE EFFECTIVE THE DATE YOUR APPLICATION FOR RETIREMENT IS RECEIVED BY PSERS.”

Appellant also attended a PSERS’s Retirement Exit Counseling session with a PSERS counselor on August 16, 2006. The PSERS counselor reviewed important aspects of Appellant’s retirement estimate with Appellant at the August 16, 2006 Exit Counseling session, including a review of the method for determining final average salary, service credit, and a beneficiary’s retirement date.

Appellant’s Exit Counselor credibly established that she would have printed a copy of Appellant’s Retirement Statement for review during her Exit Counseling session in the event Appellant failed to bring her retirement statement with her to the Exit Counseling session. *See, Hoffman v. State Employees’ Retirement Board*, 915 A.2d 674, 680 (Pa. Cmwlth. 2006). The record also shows that the PSERS’s counselor discussed Premium Assistance with Appellant during the counseling session, and that she provided Appellant with a *PSERS Health Options Program* handout which set forth the eligibility requirements for the Program in the event Appellant had twenty-four and one-half (24 1/2) years of credited service; had a termination date and retirement date on, or after age sixty-two (62) with at least fifteen (15) years of service; or was collecting disability through PSERS. Further, the PSERS’s counselor would have responded to any questions asked of her by Appellant at the Exit Counseling session regarding the effect of Appellant’s workers’ compensation benefits, if any, on Appellant’s calculation of

benefits, including discussing with Appellant the termination date of her employment as it related to Appellant's effective date of retirement.

PSERS also provided Appellant an Initial Retirement Benefit letter on September 21, 2006. The letter identified Appellant's termination date as June 30, 2003, and her retirement date as August 24, 2006. An Intent to Change form was included with the September 21, 2006 Initial Retirement Benefit letter. The Intent to Change form provided Appellant the opportunity, until October 25, 2006, to change the retirement option she had selected including voiding the retirement application or changing the effective date of retirement. Notably, Appellant did not make any changes to her retirement selections by October 25, 2006. For the foregoing reasons, Appellant's assertion that she would not have retired on August 24, 2006 had she known the amount of service credit she actually accrued is directly refuted by overwhelming evidence that Appellant knew, or should have known, the extent of her service credit at the time of her retirement.

Upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the following Recommendation will ensue:

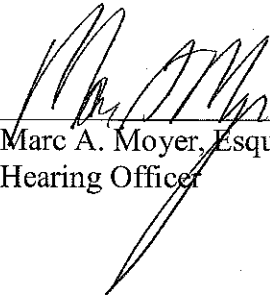
**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM**

In Re: Account of Pearl I. MacKerchar : Docket No. 2013-13

Claim of Pearl I. MacKerchar :

RECOMMENDATION

AND NOW, this **30th** day of **October, 2014**, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Appellant's request for service credit for the period Appellant was not working for the School District of Philadelphia and was receiving Workers' Compensation benefits, from September 11, 2001 through July 20, 2006, be **DENIED**.



Marc A. Moyer, Esquire
Hearing Officer

DATE: October 30, 2014